UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IN RE: WORLD TRADE CENTER DISASTER SITE LITIGATION

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Docket No.: 21 MC 100 (AKH)

PLAINTIFFS' MEMORANDUM IN PARTIAL OPPOSITION TO DEFENDANTS' OBJECTIONS TO ORDER ACCEPTING REPORT OF SPECIAL COUNSEL PROVIDING FOR EFFECTIVENESS OF SETTLEMENT

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PRELIMINARY STATEMENT

Plaintiffs respectfully offer the within Memorandum in Partial Opposition to the Defendants' Objections to Order Accepting Report of Special Counsel Providing for Effectiveness of Settlement, filed January 31, 2011. Defendants received the benefit of their bargain, achieving dismissals with prejudice of cases that had not settled under the SPA.

THE DISMISSALS OF PLAINTIFFS CASES FOR FAILURE TO PROSECUTE SHOULD BE DEEMED "VOLUNTARY" DISMISSALS PURSUANT TO SECTION VI.A. OF THE SPA, REDUCING THE EPL ACCORDINGLY.

Throughout the summer and fall of 2010, as plaintiffs' settlement packages were mailed from WGENB offices, we engaged in thousands of contacts with the EPL plaintiffs to provide them adequate information for them to fully understand the Settlement Process Agreement as Amended ("SPA") that they were being offered. Our contacts with the clients went beyond simply explaining the SPA, however. When clients called with questions, we would check their files to be sure they were up to date; information missing from their file in our database, was sought, recorded and updated in our system. At every step of the process, we have endeavored to obtain full cooperation from our clients; to provide them adequate and clear information so that ultimately, we could obtain and timely proffer their settlement documents, in proper form with notarized signatures, to the Captive and the Allocation Neutral.

As this Court has learned in a series of discussions with counsel prior to these motions, however, there has been a relatively small section of the client population who were either slow to respond to our many entreaties (or failed to respond at all), some clients failed to return their settlement papers and some returned their papers with missing signatures or that were deficient in some other way. For those plaintiffs, throughout August, September, October and even up to *and after* the November 8, 2010 deadline, we sent innumerable letters, email communications, text messages to their mobile phones and, over many weeks throughout the autumn months, while we met with drop-in clients in our various offices (White Plains, Manhattan and Great River, New York and Marlton, New Jersey) and at well publicized meetings in hotels in the metropolitan New York City area, every attorney and staff member who could be spared from other court appearances or other matters in our four offices was on the road, quite literally going door-to-door to collect the settlement papers from those plaintiffs who remained unresponsive.

It is because we were all involved in this Herculean effort that we find certain portions of the Defendants' "Objections to Order Accepting Report of Special Counsel Providing for Effectiveness of Settlement," filed January 31, 2011 to be so disheartening. This Court has already recognized in the December 22, 2010 conference that WGENB's efforts to reach all of the outstanding plaintiffs who were then termed non-responsive and to assist Mr. Hoenig's team in the effort had been "diligent". *See* Conference Transcript, December 22, 2010, at p. 6 (Exhibit "A"). Mr. Hoenig's reports back to this Court echoed that fact. *See, e.g.,* Hoenig Cover Letter to Special Counsel's Report, December 21, 2010 (Exhibit "B") ("We received excellent and unreserved cooperation from William H. Groner and Christopher LoPalo of plaintiffs' law firm. They made our task easier, which was much appreciated given the narrow time frame and the large number of persons needing outreach"). *See also* Special Counsel's Report (Exhibit "C") at p. 5:

> The Court's November 24 Order called for cooperation by plaintiffs' counsel and access to their records. We got it. Mr. Hoenig and his partner, Natalie Lefkowitz, conferred by phone with attorneys William H. Groner and Paul J. Napoli who offered their assistance. We decided that communications with plaintiffs' counsel would be more effective if one or two contact persons were designated. They, in turn, could invoke the assistance of others in their office. Mr. Groner offered his own assistance "24/7" and he truly made good on that offer as Mr. Hoenig and Ms. Lefkowitz often called upon him to discuss implementation of the Project. Mr. Groner designated attorney Christopher LoPalo, another of Plaintiffs' counsel, to be a contact person familiar with their records and plaintiffs' personal data. *Mr. LoPalo, too, did not disappoint.* His cooperation was prompt and responsive to our requests. *Mr. Groner also met with Special Counsel's team in person, described the challenges to be expected in contacting the plaintiffs and answered questions*. Mr. LoPalo provided last-known contact information regarding the Eligible Plaintiffs who had not yet opted in, as well as other data critical to our assignment. Information was supplemented by them as needed. (Emphasis added).

While we agree with some aspects of the defendants' request to correct the record filed on January 31, 2011, Plaintiffs take issue with the vitriol of defendants' motion, which accuses plaintiffs' counsel of improprieties without so much as a stitch of evidence to support their accusations. Indeed, defendants' brief goes so far as to state that plaintiffs or, more pointedly, their counsel, have "game[d] the system by signing up phantom Plaintiffs[1] and then dismissing those cases to reduce the EPS and reach the opt-in threshold." *See* Defendants' Brief at p. 9. The meritless and scurrilous suggestion that this firm intentionally filed frivolous claims in this Federal District Court on behalf of *imaginary clients* is absolutely false, outrageous and without any basis in fact. Indeed, *no factual proofs have been submitted by the defendants for this outlandish accusation* and this Court should reject that contention in the *strongest* possible terms.

[1] Every so-called "phantom" plaintiff represented by this office has a valid retainer agreement.

Indeed, the settling defendants and the WTC Captive Insurance Co., Inc. ("Captive") have received the benefit of their bargain. Ultimately, they have settled and bought their peace on the claims of 99.9 percent of the plaintiffs who sued the City and its Contractors. As this Court recognized on December 22, 2010:

> What we have, so we should not overlook the point, is an overwhelming percentage of acceptances. I can't imagine a settlement of any major litigation that has even come close to this percentage of acceptances. It's an extraordinary vote of confidence in the lawyers who brought that about that, Worby Groner and the Nicholas Papain firm, and in the defendants and Ms. Warner and her colleagues who brought this about.

Conference Transcript, December 22, 2010 (Exhibit "A") at p. 13. The defendants now try to undermine the settlement's success and paint it in the worst possible light in an attempt to embarrass this Court and the parties involved.

Their argument on the one side is written to smear plaintiffs and their counsel, on the other, clearly takes the position that this Court is without the authority to monitor proceedings in its own courtroom. Contrary to defendants' contention that this Court has not considered the parties' positions on these issues stated in the defendants' Objections of January 31, 2011, on November 18, 2010 and November 23, 2010[2] this Court heard extensive discussion from the parties' counsel in favor of this Court accepting the stipulations of voluntary discontinuance in compliance with SPA Section VI.A. that WGENB had previously provided. Those stipulations were prepared and filed upon approval and consultation with Special Master Roy Simon about how best to deal with missing or unresponsive plaintiffs.

On November 23, 2010, in particular, this Court heard extensive discussion regarding the lengths to which this office went to find plaintiffs who were missing or non-responsive to

[22] As both transcripts from November 18 and November 23 remain sealed, they are not filed in conjunction with this motion, but references to pages are provided in the assumption this Court, defendants and the Captive's counsel have copies of the transcripts at issue.

confirm their intentions to either voluntarily discontinue their claims (SPA Section VI.A), opt in to the Settlement or opt out and continue to litigate. For defendants' counsel to claim now that this office was in any way lacking in diligence or that we have "done nothing" to merit the increase in attorneys fees that will naturally result from a higher payment by the Captive, is simply unsupported by the record. We have done all and more than the SPA required of us and the proof of that fact is found in the incredible rate of plaintiffs in this massive litigation who have opted in to the SPA. This Court has repeatedly commented on the unusually high rate of acceptance this settlement has reached.

It was at those *in camera* conferences when this Court determined and advised counsel that it would appoint Mr. Hoenig as Special Counsel and the same issues were discussed retrospectively at the December 22, 2010 Conference. (*See* Court's November 24, 2010 Order appointing Mr. Hoenig [Exhibit "D"]). When the dismissal of plaintiffs' cases served to reach the opt-in threshold, Ms. Warner and the Captive were completely in favor of this Court ordering dismissals and removal of those plaintiffs from the EPL. That they should take the opposite position now when the removal of these dismissal or discontinuing plaintiffs will increase the Captive's obligation of payment under the SPA is disingenuous and inconsistent with their prior-stated and indeed prior-*argued* positions, as well as the intent of the parties who negotiated or entered into the SPA.

As defendants have asserted in their Objections, this Court has inserted itself into the process that the parties had agreed upon for voluntary discontinuances of plaintiffs' claims (set forth in Section VI.A of the SPA). Our office had submitted the proper Stipulations of Voluntary Discontinuance according to the SPA, but our efforts were interrupted by this Court's stated concern that the plaintiffs who were not responding to their attorneys' outreach were not fully appreciating that the result would be a with prejudice dismissal of their claims for failure to prosecute. (November 23, 2010 *in camera* hearing transcript at p. 16). This Court also noted that in the event the non-responsive plaintiffs continued to withhold response from Mr. Hoenig and his team, such involuntary dismissals would require a motion by defendants under Fed. R. Civ. P. 41(b). (November 23, 2010 *in camera* hearing transcript at p. 18). At that point in the hearing, this Court plainly stated that such dismissals would result in "probably a reduction of the total of eligible plaintiffs." *Id.*, lines 18-21.

Plaintiffs and their counsel relied on this Court in so stating and Ms. Warner, by her silence in response to this point, acquiesced and seemingly gave the process and result her own and her client's full support. We relied on that apparent agreement by the Captive, as well as on this Court's statements in accepting the process this Court proposed in appointing Special Counsel and in acquiescing to this Court's and Special Counsel's efforts thereupon, respecting this Court's wishes and giving it our full support. Indeed, as noted *infra*, we also acquiesced in this Court's directive that we refrain from our continued efforts to contact these non-responsive plaintiffs, efforts that may well have produced more voluntary discontinuance stipulations had they been permitted to continue unabated.

Of particular note is that Ms. Warner, speaking for the Captive, thereafter asked this Court to confirm that the Captive would still have the option, at its discretion, to accept later-filed settlement documents and that such right to continue to accept those documents would not be curtailed by the Court's anticipated order(s) on these issues. *Id.*, at p. 19. Hence, if anything, the Captive was then still indicating a willingness to extend the possibility of settling to these outstanding plaintiffs notwithstanding the fact of their coming to the table so late in the game.

Moreover, it was a proposed procedure submitted to the plaintiffs, the Court and Special Master Twerski by the Captive's counsel on November 13, 2010[3] that was the prelude to this Court's inquiry into the non-responsive plaintiffs and the dismissal stipulations in the first place. This Court ultimately gave the Captive and the defendants a procedure that, while somewhat different from the proposed procedure, fulfilled its purpose and function. On December 22, 2010, this Court plainly alluded to the orders it intended to enter, and the parties' counsel (including the Captive's counsel) understood that they would have an opportunity to review those orders and move to vacate or modify the orders as they deemed appropriate. In allowing for that possibility, this Court prospectively undermined the defendants' current contention that this Court acted without allowing the parties an opportunity to be heard on the issues. Indeed, the very motion papers filed by defendants on January 31, 2011 constitute their statements of position on the issues at hand.

On January 31, 2011, defendants argued that this Court's Orders of involuntary dismissal should not inure to the plaintiffs' benefit (in the form of reducing the numbers of plaintiffs on the EPL) because they were orders of involuntary dismissals for failure to prosecute, rather than approvals of plaintiffs' voluntary discontinuances. We provided voluntary stipulations of discontinuance from many of our non-responsive plaintiffs based on their repeated exhortations to us that they did not want to continue the litigation. This Court rejected them in mid-November and appointed Mr. Hoenig to investigate the plaintiffs' true desires. In appointing that Special Master, our efforts to continue to obtain clear written statements of intent from these voluntarily discontinuing plaintiffs were cut off (*see* discussion at pp. 20-25 of November 23, 2010 in camera hearing transcript). As noted *supra*, such efforts by our office may well have proved

[3] No copy is filed due to FRE 408 confidentiality concerns.

successful if we had been permitted to continue. As well, Professor Simon had repeatedly approved our communications with these clients and counseled that we had an ethical obligation as their attorneys to follow even their verbal direction to discontinue the actions on their behalf.

The remaining plaintiffs in the settlement who stand to benefit from a reduced EPL are the most seriously injured members of Tier 4. They should not be punished for the Captive's unwillingness to accept that they were fully apprised of this procedure and embraced it whole heartedly. Indeed, the purpose behind holding back certain sums set forth in the SPA was so that the Captive could defend and indemnify its insureds for opt out claims. The Captive should not be heard to complain when the claims of certain plaintiffs who have refused to opt in or out are dismissed, since the Defendants obtain the benefit for which they negotiated and entered into the SPA: the dismissal of suits with prejudice. Since there is no need to retain these funds set forth in the SPA to defend and indemnify the claims of dismissed plaintiffs, those funds should be allocated to the benefit of the settling plaintiffs. If the Captive did not want to include dismissed plaintiffs in the calculation of the required settling percentages, then they should have caused such language to be inserted into the SPA, but they did not. The SPA, negotiated at arms length by the parties, permits dismissed plaintiffs to affect the percentage of settled claims required for additional claim funding. Any other result is contrary to the express language of the SPA and inequitable.

CONCLUSION

We ask that this Court find such dismissals should be deemed in full compliance with SPA and the number of plaintiffs on the EPL should be reduced accordingly.

Dated: New York, New York
February 1, 2011

Respectfully submitted,

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ATTORNEY'S DECLARATION/AFFIRMATION OF SERVICE

Denise A. Rubin, an Attorney duly licensed to practice before the Courts of the State of New York, hereby affirms/declares the following under penalty of perjury:

I am associated with the law firm Worby Groner Edelman & Napoli Bern, LLP and as such represent the plaintiffs in the within action. On February 1, 2011, I duly served a true copy of the within Memorandum in Partial Opposition to the Defendants' Objections to Order Accepting Report of Special Counsel Providing for Effectiveness of Settlement, filed January 31, 2011 on the persons listed below by e-mail.

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